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NO. 86-1405

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Respondent begins its brief by falsely representing, "Contrary to Petitioner's assertions, the per curium decision of the Court of Appeals . . . is not in conflict with any decision of any

other federal Court of Appeals (Br. Op. 2)." That assertion is squarely contradicted by the opinion of the court below (Pet. A5). If there be any doubt about the conflict, the AUTO-CITE listing of Lerman v. Flynt Distributing Co., 789 F.2d 164 (2d Cir. 1986)(available on LEXIS terminals) expressly identifies the decision of the court below as being in conflict with Lerman.

While respondent expressly states, "THERE IS NO CONFLICT BETWEEN THE CIRCUITS (Br. Op. 2)," respondent makes no express statement contradicting our position that the decision of the court of appeals is in conflict with Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964)(Pet. 12-14). Br. Op. 1-9.

2. Respondent misleadingly represents that "petitioner correctly suggests . . . FRAP 39(e) is nothing other than

the codification of the long-standing holding that the costs of obtaining a supercedeas bond are properly taxed as an item of costs. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, 316 F.2d 799 (2d Cir. [sic] 1966); In re Northern Indiana Oil Co., 192 F.2d 139 (7th Cir. 1951) (Br. Op. 6)."

What we actually said was that the Advisory Committee expressly limited cost recovery under Rule 39(e) to "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, . . . (Pet. 19)." (Emphasis added). Sunkist was not cited by the Advisory Committee, and Northern Indiana Oil Co. was cited by the Advisory Committee as one of four cases supporting the foundation for that language because "Provision for taxation of the cost of premiums paid for supersedeas bonds is

common in the local rules of district courts and the practice is established in the Second, Seventh and Ninth Circuits." (Emphasis added).

Regardless of whether the court below or the Second Circuit is correct in ruling on whether Rule 39(e) authorizes taxing costs in addition to "the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal," it is important that this Court resolve that question to guide lawyers in securing judgments pending appeal, and courts in properly taxing costs claimed by a securing party.

3. Respondent falsely states that "respondent meets the three factors described in Lerman as essential to the TWA result . . . (Br. Op. 5)." Respondent met none of them.

The Second Circuit Court of Appeals said:

> Critical to our decision in Trans World Airlines were three circumstances. First, the costs held taxable "were costs in lieu of providing a supersedeas bond as provided by the rules." Id. at 177 (footnote omitted). We held that the letter of credit served the same purpose as a supersedeas bond[1] and agreed with the District Court that the fee paid on the letter of credit was an allowable cost of appeal because it was analogous to the bond premium cost authorized by Rule 39(e). The audit and security costs were also held taxable because they served the same purpose as the letter of credit, that is, providing adequate security to T.W.A. Second, the alternate arrangements in lieu of a supersedeas bond were agreed to by the party opposing the appeal and approved by the District Court. Id. at 177. Third, the alternative arrangements cost less than a supersedeas bond would have cost. Id. at 178. 789 F.2d at 166.

Manifestly, in the case at bar the costs of the letter of credit were not

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[1] A letter of credit was used only because the size of the judgment made obtaining a supersedeas bond "impracticable." Id. at 175.

"costs in lieu of providing a supersedeas bond as provided by the rules," but were in addition to "the premiums paid for cost of supersedeas or other bonds to preserve rights pending appeal . . . (Pet. 6)." Nor were any "alternate arrangements in lieu of a supersedeas bond" "agreed to by the party [petitioner] opposing the appeal and approved by the District Court." Nor is there any evidence of "alternative arrangements [that] cost less than a supersedeas bond would have cost."

4. Without citation of authority, respondent concludes, "The amount involved here is so insignificant that it does not merit the time or attention of this Court (Br. Op. 8)."

Nothing in Rule 17 mentions amount in controversy as a consideration governing review on certiorari. This

case does involve many considerations set forth in the rule for granting certiorari, including conflict between circuits (Pet. 11-12), conflict with an applicable decision of this Court (Pet. 12-14), and an important question of federal law which has not been, but should be, settled by this Court (Pet. 14-16).

Furthermore, the Court may decide the question presented on a compact record that will enable the Court to concentrate on an answer to a question of law that will be important to every court and litigant involved in a case requiring security pending appeal. Not only is the answer important at cost taxing time when the secured judgment is reversed, but it is also important at security posting time to encourage lawyers to work with the courts in reaching agreement on the form of security and who pays what costs

if the judgment is reversed.

The conflict with decisions of this Court, the Second Circuit, the applicability of Rule 39(e) to many cases, the national importance of having a uniform interpretation of the Federal Rules of Appellate Procedure and the other reasons presented in the Petition support a conclusion that the Petition should be granted, regardless of which party eventually prevails.

CONCLUSION

For the foregoing reasons and those advanced in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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